

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<i>In the Matter of</i>	)	
	)	
Closed Captioning and Video Description	)	
of Video Programming	)	CGB Docket No. 06-181
	)	CC-0045
The Local Newspaper, Inc.	)	

---

Directed to: Consumer and Governmental Affairs Bureau

**Reply to Opposition**

First Assembly of God, Van Buren (“Respondent”), by its attorneys, hereby respectfully submits its Reply to the March 2, 2007 opposition (“Opposition”) filed by Telecommunications for the Deaf and Hard of Hearing, Inc. *et al.* (“Commenters”) in the above-captioned proceeding.<sup>1</sup> The Commenters filed their Opposition to Respondent’s petition for **an** exemption from the Commission’s closed captioning requirements on the basis of undue burden (“Petition”), claiming that the Petition does not provide the requisite evidence necessary to support its request. While the Commenters’ submission is written as an opposition, it is in fact in the nature of a petition for reconsideration, as Respondent’s petition was granted on September 11, 2006, by letter of the Chief, Disability Rights Office, Consumer and

---

<sup>1</sup> The *Public Notice*, “Extension of Comment Period on Petitions for Exemption from Commission’s Closed Captioning Rules; *Ex Parte* Treatment of Filings in Docket,” CG Docket No. 06-181, DA 06-2329, released November 21, 2006 (“*Extension Public Notice*”) established March 27, 2007, as the deadline for submitting comments and oppositions to petitions for exemption from the closed captioning rules. The *Extension Public Notice* also established a period for filing replies to such oppositions of 40 days in lieu of the usual period of 20 days from the close of the comment period established by Section 79.1(f)(6) of the Commission’s rules. Accordingly, this Reply is timely **filed**.

Governmental Affairs Bureau, Reference CGB-CC-0045 (the “Grant Letter”). While Respondent recognizes that the Commenters’ submission was made in response to the Commission’s *Public Notice*, “Consumer and Governmental Affairs Bureau Action Request for Exemption from Commission’s Closed Captioning Rules,” CG Docket No. 06-181, DA 06-2287, released November 7, 2006 (“*Exemption Request Public Notice*”), that *Exemption Request Public Notice* was released after the grant of the Respondent’s petition had become final, and the subsequent reconsideration request was therefore untimely. Moreover, the Petition, on its face, did provide sufficient evidence and the Commission should uphold its grant of the request. Although not necessary for affirmation of its grant, Respondent addresses 1) the Commenters’ misguided interpretation of the effectiveness of the current legal standard for a waiver of mandatory closed captioning and, 2) the sufficiency of the evidence presented in the Petition.

### **Discussion**

#### **I. The *Exemption Request Public Notice* Was Issued after Finality of the Grant of Respondent’s Petition and Therefore Could Not Effectively Hold that Action in Abeyance.**

On December 19, 2005, Respondent filed its petition for exemption from the requirements of the Commission’s closed captioning rules based on undue burden. Thereafter, the Commission’s staff issued the Grant Letter, dated September 11, 2006. Section 1.4(b)(5) of the Commission’s Rules provides in the case of a document that is neither published in the Federal Register nor released to the public, and with regard to which a descriptive public notice is not released, the day to be considered as the date of “public notice” of that document is the date appearing on the document sent to the affected parties. In this case, as noted above, that date was September 11, 2006. Section 1.106 and the Communications Act of 1934, as amended, provide that any petition for reconsideration of an action taken by the Commission’s staff must

be filed within 30 days of the date of public notice of that action.<sup>2</sup> Furthermore, Section 1.117 of the Commission's rules states that it may, within 40 days of public notice, review on its motion any action taken pursuant to delegated authority.

In the instant case, as the date of the Grant Letter was September 11, 2006, that 40 day period expired on October 23, 2006 (October 21 was a Saturday). The *Exemption Public Notice*, however, was not released until November 7, 2006, 15 days after the Grant Letter became a final action, no longer subject to reconsideration or review. While the *Exemption Public Notice* recognized that some of the listed petitions for exemption had already been granted and indicated that it was holding such actions in abeyance, it did not explain how it was possible to hold in abeyance grants that had already become final. While Respondent recognizes that the initial Grant Letter was issued without the requisite prior public notice, the fact remains that the Respondent's petition was granted, and the Commission did not act to rescind, stay, reverse, or otherwise hold in abeyance the grant until after the specified 40 day period had elapsed. The

---

<sup>2</sup> Likewise, Section 1.115 of the Commission's Rules provides that any application for review of an action taken pursuant to delegated authority must be filed within 30 days of the date of public notice of the action. Respondent recognizes that Commenters on October 12, 2006, filed an Application for Review with respect to the decision in *Anglers for Christ Ministries, Inc. and New Beginning Ministries, Video Programming Accessibility, Petitions for Exemption from Closed Captioning Requirements*, Memorandum Opinion and Order, DA 06-1802, ¶ 7-8 (rel. September 12, 2006) ("Anglers Order"), and mentioned in that Application for Review all decisions based upon that decision should be rescinded. It must be remembered, however, that each petition for exemption is a separate proceeding with its own unique circumstances, and a blanket statement in one proceeding is ineffective to drag in other, separate proceedings. If the Commenters had wished to contest the findings of the Commission's staff with regard to Respondent's particular circumstances, it could and should have filed a separate Application for Review with regard to Respondent. Commenters cannot bootstrap these other grants into the single Application for Review. As discussed below, the Commission's decision in the Anglers Order remains applicable unless and until it is overturned. Moreover, in the instant case, the period for filing applications for review expired on October 11, 2006, and Commenters did not file anything until after that date.

essential legal concept of administrative finality requires that the Commission be governed by its own procedural rules in such matters. Therefore, by the time that the *Exemption Public Notice* was released, the Grant Letter was no longer subject to being held in abeyance.

Furthermore, that *Public Notice* was ineffective in extending the time period for seeking reconsideration of the Grant Letter. As noted above, the time period within which an interested party must seek reconsideration of a Commission action is set by statute. Specifically, 47 U.S.C. Section 405(a) provides that any petition for reconsideration of any action taken by the Commission through delegated authority shall be filed within 30 days of the date of public notice of the action taken. Since this provision is statutory, it cannot be waived by the Commission. Thus, the Commission's notice that it intended to hold in abeyance its action in the Grant Letter, not issued until substantially after the time for seeking reconsideration of the Grant Letter had already expired, cannot extend the time period for seeking reconsideration of that action. Thus, Commenters' submission must be dismissed as an untimely petition for reconsideration.

#### **11. The Standard for Review of Petitions for an Exemption from Closed Captioning Requirements Established in the *Anglers Order* is Currently Effective.**

Section 713(e) of the Communications Act of 1934, as amended ("Communications Act") and Section 79.1(f) of the Commission's rules allow the Commission to grant a petition for an exemption to the closed captioning requirements upon a showing that meeting those requirements would impose an undue burden on the video programming provider or owner. Section 79.1(f)(2) sets forth four factors to be taken into account in determining whether captioning would give rise to an undue burden: (1) the nature and cost of the closed captions for the programming; (2) the impact on operation of the provider or program owner; (3) the financial

resources of the provider or program owner; and (4) the type of operation of the provider or program owner.<sup>3</sup> The Respondent's Petition presented sufficient evidence to meet all four factors of these factors.

In a recent case involving the undue burden standard, similar to the instant case, the Consumer and Governmental Affairs Bureau ("the CGB") considered the petitions for closed captioning exemptions submitted by two video programming owners, Anglers for Christ Ministries, Inc. and New Beginning Ministries, Inc., in a consolidated Memorandum Order & Opinion. That decision states that Section 713 and its legislative history "evinced that the goal of ensuring that video programming is accessible to those with hearing disabilities must, in certain circumstances, be balanced against the economic burdens that closed captioning requirements present to the providers or owners of such programming" and highlights the existence of statutory categorical exemptions from captioning for ITFS programming and locally-produced, non-news programming with no repeat value.<sup>4</sup> In granting the petitions before it, the CGB stated that it would be "inclined favorably" to grant petitions filed by non-profit organizations that do not receive compensation from video programming distributors for the airing of their programming and that, in the absence of an exemption, may terminate or substantially curtail the programming or other activities important to their mission.<sup>5</sup>

The Commenters, having filed an application for review of the *Anglers Order*, allege that the CGB improperly created a new standard and that the Commission may not rely on this

---

<sup>3</sup> 47 C.F.R. §79.1(f)(2).

<sup>4</sup> See Anglers Order at ¶ 7-8.

<sup>5</sup> *Id.* at ¶ 11.

standard while the decision is under review. This contention is legally untenable and strains the limits of permissible advocacy. The decision of an administrative agency such as the Commission, with rulemaking and adjudicative powers, binds the affected parties and serves as legal precedent for similarly situated parties going forward. Further, Section 5 of the Communications Act provides that Bureau orders “shall have the same force and effect” as Commission action, under the general authority given to the Commission to delegate its functions.<sup>6</sup> As to the effectiveness of a non-hearing Bureau order for which review has been sought, a longstanding Commission rule indicates that unless otherwise specified, orders are effective upon release unless the Commission, in its discretion, stays the decision during the completion of its review.<sup>7</sup> The Commission has made no other specifications with respect to *Anglers Order*, nor did it issue a stay of the decision. Consequently, it is the applicable Commission precedent until such time as it is stayed or overturned by the Commission.

The mere appeal of a Commission order does not trigger an automatic stay, except in certain limited situations, carved out by statute (not applicable here). In the case *Application of WEAM Radio, Inc. and Viacom Broadcasting, Inc.*, the FCC declared and the Court of Appeals for the District of Columbia upheld that, “where an aggrieved party alleges that it will be harmed by the immediate effectiveness of a staff ruling, the appropriate remedy is to seek a stay of that action,” a remedy the Commenters did not seek.<sup>8</sup> Without having undertaken this necessary and

---

<sup>6</sup> See 47 U.S.C. §155(c).

<sup>7</sup> See 47 C.F.R. §1.102(b)(2) (emphasis added).

<sup>8</sup> A party desiring such an outcome must file a Motion for a Stay which meets a four-part test: (1) substantial likelihood of success on the merits, (2) irreparable harm, (3) no substantial harm to others and, (4) a stay would be in the public interest. See *Application of WEAM Radio, Inc. and Viacom Broadcasting, Inc.*, 1985 FCC LEXIS 3308, \*6-7(1985), *aff’d* by Committee to Save WEAM v. FCC, 808 F. 2d. 113 (D.C. Cir. 1986).

rigorous step *and* having received a grant from the Commission, the Commenters may not deny the effectiveness of the standard established in the *Anglers Order*.

In *Melody Music v. FCC*, the Court of Appeals for the District of Columbia held that similarly situated parties should not be subject to disparate treatment.<sup>9</sup> The Commenters have failed to show how the Petition, and the facts therein, differ from the petitioners and the relevant circumstances described in the *Anglers Order*. As discussed above, the Commenters falsely assert that the Commission may not rely on the *Anglers Order* when deciding whether to grant undue burden petitions. Unfortunately for the Commenters, the opposite is true: *Anglers Order* is the standard by which such petitions must be analyzed and entities that demonstrate the same “confluence of factors”<sup>10</sup> as those enumerated in the *Anglers Order* are entitled to be viewed favorably for a grant of their petition.

### **III. Respondent’s Petition Met the Evidentiary Requirements to Demonstrate an Undue Burden**

Respondent’s Petition clearly conforms to the standard set out in the *Anglers Order* and its grant should be upheld based on its sufficiency in this regard. Respondent is a non-profit church organization, the programming for which it seeks an exemption is noncommercial, and it receives no compensation from broadcast of the show. *See* Declaration of Torin L. Johnson, attached hereto as Exhibit A. In fact, Respondent pays for airtime from the donations that it receives from the congregation. *Id.* Additionally, because adding closed captioning would tax its already tight production schedule and consume the limited production resources, without an

---

<sup>9</sup> *See Melody Music v. Federal Communications Commission*, 345 F. 2d 730,732 (D.C. Cir. 1965).

<sup>10</sup> *Anglers Order* at ¶ 11.

exemption, it would be forced to cease its broadcasts altogether. *Id.* It should be noted that, in clarifying the scope of the categorical exemption for locally produced, non-news programming, the Commission declared that it “wanted to ensure that our captioning requirements did not prevent the distribution of the most local public interest programming.”” Respondent’s program, “Reach Out,” includes discussion of the significant issues of the day in a biblical context. This is precisely the type of programming that should not be forced to cease broadcasting altogether based upon the heavy burden of closed captioning costs.

Respondent has clearly stated the applicable captioning costs in its Petition. These figures represent the results of process of soliciting bids. As set forth in his attached Declaration, Associate Pastor Torin L. Johnson called around to a number of sources in an attempt to find the least expensive method of closed captioning the program. *Id.* As a result of those calls, the church received one bid to provide captioning for the one hour program for \$31,200. In addition, a bid for software to allow the church to undertake the closed captioning itself was for \$7,000. This figure, however, does not include ongoing costs of upgrading the software or, more importantly, personnel costs for completing the job of closed captioning. Currently, the Mr. Johnson serves as the Youth Pastor and also undertakes the production, including filming and editing, of the show “Reach Out.” If the closed captioning duties were added to this already busy schedule, there would be a significant, negative impact on Mr. Johnson’s ability to carry out his responsibilities as Youth Pastor. The only alternative would be to hire an additional person, either to film and edit the show or to undertake the closed captioning. Mr. Johnson made inquiry to a nearby television station as to costs for filming and

---

<sup>11</sup> See Closed Captioning and Video Description of Video Programming, Order on Reconsideration, 13 FCC Rcd 19973,20000 (1998).



editing and was told that the costs for filming would be in the range of \$125 to \$175 per hour, and the costs of editing would range from \$250 to \$350 per hour. Likewise, Mr. Johnson understands that a steep learning curve is involved in learning how to use the closed captioning software, and it would therefore be necessary to hire a skilled worker to undertake that project. In the interim since the Respondent's petition was initially filed, the church has received letters from two different companies with offers for closed captioning services. These letters were received in November and December 2006. The services would require that the church send its completed program to the company, which then would add the closed captions. Both letters specified a charge of \$300 per week, which works out to \$15,600 per year, for the closed captioning service. Even though the charges specified are reduced below previous estimates, these expenses are well beyond the current budget for the programming and would make its continuation prohibitively expensive. *Id.*

Respondent acknowledges that it has not extensively solicited contributions specifically for the purpose of supporting closed captioning. Contrary to the position taken by the Commenters in their Opposition, however, petitioners seeking an exemption from closed captioning need not make such a solicitation. In the *Anglers Order*, the CGB overruled a prior decision suggesting that soliciting captioning assistance was a precondition to receiving an undue burden exemption.\*

As previously stated, the Respondent's Petition on its face supports the Commission's previous grant. Nevertheless, to facilitate the Commission's processing of the instant matter, Respondent now submits additional financial information, further supporting the statements made in the Petition and reiterated here. This evidence makes clear that Respondent

---

<sup>12</sup> See *Anglers Order* at ¶11

unquestionably meets the undue burden standard.

**IV. Conclusion**

For the foregoing reasons, Respondent hereby requests that the grant of its Petition be upheld and that the Commenters' objection be dismissed or denied.

Respectfully submitted,

FIRST ASSEMBLY OF GOD, VAN BUREN

By:   
Joseph M. Di Scipio  
Anne Goodwin Crump

Its Attorneys

Fletcher, Heald & Hildreth, P.L.C.  
1300 North 17th Street  
Eleventh Floor  
Arlington, Virginia 22209  
(703) 812-0511

May 4, 2007

**EXHIBIT A**

*See attached.*

## DECLARATION

I, Torin L. Johnson, hereby declare and state as follows:

I am the Associate Pastor and Youth Pastor of the First Assembly of God, Van Buren. In my position, I am responsible for the production and airing of the weekly, hour-long show "Reach Out" on behalf of the church,

The show is an hour-long weekly show, which is noncommercial in nature and features singing by the church choir and sermons from our Pastor. Those sermons include discussions of issues of the day in biblical terms. The church pays for the airtime to broadcast the show, with the cost of airtime on each of the three area stations on which it airs ranging from \$700 per week to \$1,150 per week.

When I learned that closed captioning requirements could be applicable to the programming of the First Assembly of God, Van Buren, I began to call around to determine the cheapest way in which closed captioning of our programming could be accomplished. In response, we received bids of \$31,200 for a company to provide the closed captioning for our programming and of \$7,000 for the software necessary for the church to accomplish the closed captioning internally. The figure for the software did not include any future upgrades that might become necessary or any provision for the necessary personnel to utilize the software to add the closed captions to the programs. I currently am responsible for both filming and editing the program to prepare it for broadcast. If closed captioning duties were added, the substantial amounts of time required would prevent me from properly accomplishing my duties as Youth Pastor. It therefore would be necessary to hire an additional person to take over the filming and editing duties and/or the closed captioning duties.

In speaking with a friend of mine at a nearby television station, I learned that the cost to hire someone for filming would be in the range of \$125 to \$175 per hour, and the costs of editing would range from \$250 to \$350 per hour. Likewise, I understand from speaking with the software company and others in the television that a high learning curve is involved in becoming proficient with the use of the closed captioning software. The cost of hiring a skilled worker to accomplish this task would therefore be significant,

Subsequent to my initial investigation into closed captioning issues, the church received in November and December 2006 two unsolicited letters from two different companies offering closed captioning services. Both would require that we ship our completed programs to the companies, which would then add closed captions at a charge of \$300 per week, or approximately \$15,600 per year, plus shipping costs.

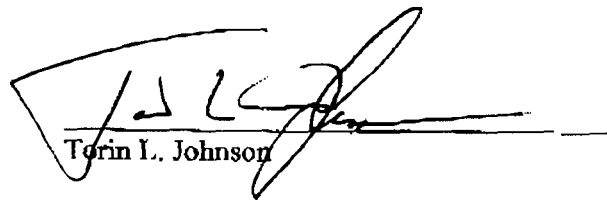
Funding of the program is currently derived from the donations and tithes given to the church. Given all of the costs involved, the addition of closed captioning would be prohibitively expensive and would require the church to terminate the broadcasts altogether. It is my understanding that the general budget of the church simply could not support the added costs, which would represent approximately 11.2 percent to over 20 percent of the current budget of the

2

programming, depending upon which captioning option was chosen. The current church budget is already stretched thin, and the addition of further substantial costs simply could not be supported at this time.

I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 2<sup>nd</sup> day of May, 2007.



Torin L. Johnson

**CERTIFICATE OF SERVICE**

I, Kerry A. Allden-Collins, a secretary at the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that true copies of the foregoing "Reply to Opposition" were mailed, U.S. first class mail, postage prepaid on this 4<sup>th</sup> day of May, 2007, addressed to the following:

Paul O. Gagnier, Esq.  
Bingham McCutchen LLP  
2020 K Street, NW  
Washington, DC 20007

Troy F. Tanner, Esq.  
Bingham McCutchen LLP  
2020 K Street, NW  
Washington, DC 20007

Danielle C. Burt, Esq.  
Bingham McCutchen LLP  
2020 K Street, NW  
Washington, DC 20007

  
\_\_\_\_\_  
Kerry A. Allden-Collins